TAB 5

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United States District Court,
C.D. California.
Fernando CAZARES, et al.
v.
PACIFIC SHORE FUNDING, et al.
No. CV04-2548DSF(SSX).

Jan. 3, 2006.

Stephen M. Harris, Knapp Petersen & Clarke, Glendale, CA, Susan H. Yoon, Legg Law Firm, Encino, CA, for Fernando Cazares, et al.

Eric D. Olson, H. Mark Mersel, Morrison & Foerster, Irvine, CA, Jennifer J. Carlson, Julia B. Strickland, Stephen J. Newman, Stroock Stroock & Lavan, Los Angeles, CA, for Pacific Shore Funding, et al.

CIVIL MINUTES-GENERAL

FISCHER, J.

Paul D. Pierson	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings:

(In Chambers) Order Denying the Household Defendants' Motion

to Dismiss Second Amended Consolidated Complaint (Docket

46) and Denying Household Defendants' Motion to Strike Allegations of Plaintiffs' Second Amended Consolidated Complaint (Docket # 47)

I. *INTRODUCTION*

***1** Defendants Household Finance Corporation of California, Household Finance Corporation III, HSBC Finance Corporation, and HSBC Mortgage Services Inc. ("the Household Defendants") ask this Court to dismiss the Second Amended Consolidated Complaint ("SACC") with prejudice in its entirety [FN1] because: (1) California law does not authorize assignee liability on the basis alleged; (2) California's unfair competition law does not impose secondary liability on the basis alleged; and (3) alter ego is not pleaded.

FN1. Though the Notice of Motion seeks dismissal of "all claims," the memorandum of points and authorities specifically mentions only Counts I, II, III, and IV, and the Household Defendants directly address only the claims brought pursuant to Business and Professions Code §§ 17200, et seq.

Household Defendants' Notice of Motion and Motion to Dismiss Second Amended Consolidated Complaint and Memorandum of Points and Authorities in Support Thereof ("Motion"), and Request for Judicial Notice were filed on October 12, 2005.

Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss ("Opp'n") was filed on October 31, 2005.

Household Defendants' Reply Memorandum in Support of Their Motion to Dismiss ("Reply") was filed on November 7, 2005.

Household Defendants' Notice of Motion and Motion to Strike Allegations of Plaintiffs' Second Amended Consolidated Complaint and Memorandum of Points and Authorities in Support Thereof ("Motion to Strike") were filed on October 12, 2005.

Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Strike ("Opp'n Motion to Strike") was filed on October 31, 2005.

Household Defendants' Reply Memorandum in Support of Their Motion to Strike ("Reply Motion to Strike"), Declaration of Stephen J. Newman, and Supplemental Request for Judicial Notice were filed on November 7, 2005.

The Court deems this matter appropriate for decision without oral argument. *See* Fed.R.Civ.P. 78; Local Rule 7-15. For the reasons discussed below, both motions are DENIED.

II. *LEGAL STANDARD*

A. *Motion to Dismiss*

A court can dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47 (footnote omitted). *See also Swierkiewicz v. Sorema*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (A complaint "must contain only a short and plain statement of the claim showing the pleader is entitled to relief"); *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir.2004). Dismissal is appropriate only if the plaintiff fails to assert a cognizable legal theory or to allege sufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).

In ruling on a motion to dismiss, the Court must accept as true all material factual allegations in the complaint and must construe them in the light most favorable to the plaintiff. *Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir.1997).

***2** Application of a "heightened pleading standard" is inappropriate because it conflicts with the "notice pleading" standard of Rule 8(a)(2). *Swierkiewicz*, 534 U.S. at 512 (no higher standard in employment cases). *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (no higher standard in civil rights case). Heightened pleading standards should only be applied when required by the Federal Rules. *Empress LLC v. San Francisco*, 419 F.3d 1052, 1055 (9th Cir.2005).

Allegations of fraud are excepted from the "notice pleading" standard of Rule 8(a)(2). *Swierkiewicz*, 534 U.S. at 513; *Leatherman*, 507 U.S. at 168. Rule 9(b) provides that "[i]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity." "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations. While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.1989) (citations omitted). "The Plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994) (superseded by statute on other grounds). "Rule 9(b)'s particularity requirement applies to state-law causes of action." *Vess v.*

Ciba-Geigy Corp., 317 F.3d 1097, 1103 (9th Cir.2003).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.1990). However, material properly submitted as part of the complaint may be considered. *Id.; Cooper*, 137 F.3d at 622. Moreover, a "document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." *Townsend v. Columbia Operations*, 667 F.2d 844, 848-49 (9th Cir.1982). A court may consider the full text of documents only partially quoted in the complaint. *Cooper*, 137 F.3d at 623.

B. *Motion to Strike*

A court "may order stricken from any pleading any ... redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f).

" 'Redundant' allegations are those that are needlessly repetitive or wholly foreign to the issues involved in the action." *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 217 F.Supp.2d 1028, 1033 (C.D.Cal.2002). " 'Immaterial' matter is that which has no essential or important relationship to the claim for relief ... being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993) (citing 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, 706-07 (1990)), rev'd on other grounds, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). " 'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* "Superfluous historical allegations" may be stricken. *Id.*

***3** "The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Bassiri v. Xerox Corp.*, 292 F.Supp.2d 1212, 1219 (C.D.Cal.2003); *see also California ex rel. State Lands Comm'n v. U.S.*, 512 F.Supp. 36, 38 (N.D.Cal.1981) ("[W]here the motion may have the effect of making trial of the action less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike will be well taken."). Nevertheless, such motions are "viewed with disfavor and are not frequently granted." *Bassiri*, 292 F.Supp.2d at 1220; *accord Alco Pac., Inc.*, 217 F.Supp.2d at 1033. In reviewing a 12(f) motion, courts view the pleading under attack in the light most favorable to the non-moving party. *Bassiri*, 292 F.Supp.2d at 1220. Therefore, "[m]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Id.* (citation omitted). Courts often require a "showing of prejudice by the moving party" before the challenged material will be stricken. *Alco Pac., Inc.*, 217 F.Supp.2d at 1033 (citation omitted).

III. *FACTUAL ALLEGATIONS*

Pacific Shore Funding ("PSF") is a mortgage broker that solicits financially unsophisticated clients for second mortgage loans through mail solicitation, a network of finders, and the use of an internet web site. SACC ¶ 11.[FN2] These loans are pre-sold to and financed by the Household Defendants or the John Doe Defendants. *Id.* at ¶ 12.

> FN2. Citations to the SACC are by paragraph number only. The Court assumes the truth of these allegations for purposes of this Motion only.

Household and PSF entered into a series of agreements wherein PSF agreed to obtain specified financial volumes of Residential Second Lien Mortgage loans to be purchased by Household. *Id.* at ¶ 13. As part of these agreements, Household agreed to pay additional compensation to PSF for loans that contain prepayment penalties to be paid upon a refinance or pay-off of the second trust deed securing the residence. *Id.* The Household Defendants agreed to pay more for loans with longer prepayment penalty terms. *Id.*

Fernando Cazares and Karen Cazares entered into a loan with PSF on or about July 12, 2000. *Id.* at ¶ 20.

The loan was secured by a deed of trust against their principal dwelling. *Id.* The principal loan amount was $30,000. *Id.* The Cazareses were charged and paid up-front finance charges of at least $2,378. *Id.* The loan contains a prepayment penalty provision, and the Cazareses paid an unlawful prepayment penalty. *Id.*

James Abrahamian and Kasey Abrahamian entered into a loan with PSF on or about May 1, 2001. *Id.* at ¶ 21. The loan was secured by a deed of trust against their principal dwelling. *Id.* The principal loan amount was $69,000. *Id.* The Abrahamians were charged and paid up-front finance charges of at least $4,918. *Id.*

***4** Fadl Kairouz and Amalia Kairouz entered into a loan with PSF on or about March 26, 2001. *Id.* at ¶ 22. The loan was secured by a deed of trust against their principal dwelling. *Id.* The principal loan amount was $52,300 at an annual percentage rate of 12.6415. *Id.* The Kairouzes were charged and paid up-front finance charges of at least $5,230. *Id.* This loan was assigned and transferred to the Household Defendants as prearranged by the parties. *Id.* The Kairouzes limit their claims to the Household Defendants, and make no claims against PSF. *Id.* The loan contains an unlawful prepayment penalty provision, and the Kairouzes paid an unlawful prepayment penalty. *Id.*

Zoran Lozo and Monica Lozo entered into a loan with PSF on or about August 7, 2000. *Id.* at ¶ 23. The loan was secured by a deed of trust against their principal dwelling. *Id.* The principal loan amount was $28,000 at an annual percentage rate of 15.6426. *Id.* The Lozos were charged and paid up-front finance charges of at least $2,951. *Id.* The loan contains a prepayment penalty provision, and the Lozos paid an unlawful prepayment penalty. *Id.* This loan was assigned and transferred to the Household Defendants as prearranged by the parties. *Id.*

Neil Miller and Carolyn Miller entered into a loan with PSF on or about April 16, 2001. *Id.* at ¶ 24. The loan was secured by a deed of trust against their principal dwelling. *Id.* The principal loan amount was $63,700 at an annual percentage rate of 15.7069. *Id.* The Millers were charged and paid up-front finance charges of at least $3,728. *Id.* This loan was assigned and transferred to the Household Defendants as prearranged by the parties. *Id.* The Millers limit their claims as against the Household Defendants and make no claims against PSF. *Id.*

David Chappuies entered into a loan with PSF on or about February 22, 2001. *Id.* at ¶ 25. The loan was secured by a deed of trust against his principal dwelling. *Id.* The principal loan amount was $35,000 at an annual percentage rate of 15.7367. *Id.* Chappuies was charged and paid up front finance charges of at least $3,919. *Id.* This loan was assigned and transferred to the Household Defendants as prearranged by the parties. *Id.* The loan contains an unlawful prepayment penalty provision, and the Chappuies paid an unlawful prepayment penalty. *Id.*

Gid Martin entered into a loan with PSF on or about January 23, 2003. *Id.* at ¶ 26. The loan was secured by a deed of trust against his principal dwelling. *Id.* The principal loan amount was $55,575. *Id.* Martin was charged and paid up-front finance charges of at least $5,577. *Id.* The loan contains a prepayment penalty provision, and Martin paid an unlawful prepayment penalty. *Id.*

David Lyday entered into a loan transaction with PSF on or about March 12, 2003. *Id.* at ¶ 27. The loan was secured by a deed of trust against his principal dwelling. *Id.* The principal loan amount was $47,500. *Id.* Lyday was charged and paid up-front finance charges of at least $5,124. *Id.* The loan contains a prepayment penalty provision, and Lyday paid an unlawful prepayment penalty. *Id.*

***5** Adam Hernandez entered into a loan transaction with PSF on or about February 2003. *Id.* at ¶ 28. The loan was secured by a deed of trust against his principal dwelling. *Id.* The principal loan amount was $25,000. *Id.* Hernandez was charged and paid up-front finance charges of at least $3,219. *Id.* The loan contains a prepayment penalty provision, and Hernandez paid an unlawful prepayment penalty. *Id.*

Matthew Greenwood entered into a loan transaction with PSF on or about January 30, 2003. *Id.* at ¶ 29. The

loan was secured by a deed of trust against his principal dwelling. *Id.* The principal loan amount was $40,850. *Id.* Greenwood was charged and paid up-front finance charges of at least $4,082.50. *Id.* The loan contains a prepayment penalty provision, and Greenwood paid an unlawful prepayment penalty. *Id.*

Tonya Jackson entered into a loan transaction with PSF on or about February 4, 2003. *Id.* at ¶ 30. The loan was secured by a deed of trust against her principal dwelling. *Id.* The principal loan amount was $29,450. *Id.* Jackson was charged and paid up-front finance charges of at least $2,798. *Id.* The loan contains a prepayment penalty provision, and Jackson paid an unlawful prepayment penalty. *Id.*

Julian Lugo entered into a loan transaction with PSF on or about February 6, 2003. *Id.* at ¶ 31. The loan was secured by a deed of trust against his principal dwelling. *Id.* The principal loan amount was $71,250. *Id.* Lugo was charged and paid up-front finance charges of at least $7,635. *Id.* The loan contains a prepayment penalty provision, and Lugo was charged an unlawful prepayment penalty. *Id.*

Luciano Castro and Marta Castro ("the Castros") entered into a loan transaction with PSF on or about April 7, 2003. *Id.* at ¶ 32. The loan was secured by a deed of trust against their principal dwelling. *Id.*

PSF has made numerous loans secured by junior liens to hundreds of other residents of the State of California and in other states. *Id.* at ¶ 33. The loans subject to the Home Ownership and Equity Protection Act ("HOEPA") contained unlawful prepayment penalties. *Id.* PSF's pattern and practise is to conduct the loan closings by mail or send a notary or document signer to the homes of the consumer borrowers. *Id.* at ¶ 34. As a result, the loan closings result in improper or inadequate notice of the consumer borrower's notice of right to cancel the loan transaction and of the inadequate disclosure of other material disclosures mandated by state and federal laws and regulations. *Id.* at ¶ 36. Plaintiffs allege that some of these loans also violate HOEPA by the inclusion of a prepayment penalty and improper structuring. *Id.* at ¶¶ 38, 39.

Plaintiffs allege that the Household Defendants are liable for any HOEPA violations, at a minimum, as assignees. *Id.* at 40. The Household Defendants were aware of the illegal provisions of the loan agreement because they dictated the terms, financed the loans, and paid a premium for loans that contained an unlawful prepayment penalty provision. *Id.* Additionally, the Household Defendants established this arrangement with PSF to avoid their agreement in connection with other litigation to refrain from inserting unlawful prepayment penalties in loan documents. *Id.*

***6** On August 25, 2005, Plaintiffs filed their SACC on behalf of three purported classes.[FN3] Each class asserts a claim for violation of California Business & Professions Code § 17200 as well as a claim for rescission and restitution pursuant to California Civil Code § 1689.

FN3. The Court does not at this time consider the propriety of the classes defined by Plaintiffs.

IV. *ANALYSIS*

A. *Motion to Dismiss*

1. *California Business & Professions Code § 17200*

"California's unfair competition law (UCL) (17200 et seq.) defines 'unfair competition' to mean and include 'any unlawful, unfair or fraudulent business act or practice....' " *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 949, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002). By defining unfair competition to include any unlawful business act or practice, "the UCL permits violations of other laws to be treated as unfair competition that is independently actionable." *Id.* "[I]n essence, an action based on [the UCL] to redress an unlawful business practice 'borrows' violations from other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. and subject to the distinct remedies provided thereunder." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 566-67, 71

Cal.Rptr.2d 731, 950 P.2d 1086 (1998) (citation omitted).

Because "section 17200 is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, unfair, *or* fraudulent." *Cel-Tech Commc'n v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999) (emphasis added). Thus, a practice may be unfair or fraudulent even if it is not is not specifically proscribed by some other law. A plaintiff cannot, however, plead around an absolute bar to relief by recasting the cause of action as one for unfair competition. *Cel-Tech Commc'n*, 20 Cal.4th at 182, 83 Cal.Rptr.2d 548, 973 P.2d 527. "To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct." *Id.* at 183, 83 Cal.Rptr.2d 548, 973 P.2d 527. "If ... the Legislature considered certain activity in certain circumstances and determined it to be lawful, courts may not override that determination under the guise of the unfair competition law." *Id.*

Here Plaintiffs allege that the Household Defendants' violations of section 17200 arise primarily from violations of the Truth-in-Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq. TILA is essentially a disclosure statute. The Federal Reserve Board has prescribed implementing regulations, known as Regulation Z. *See* 12 C.F.R. § 226. HOEPA amended TILA by providing additional disclosure obligations and substantive requirements for certain high-cost mortgages. *See* 15 U.S.C. §§ 1602(aa), 1639. HOEPA does not apply to open-end credit plans. 12 C.F.R. § 226.32.

Plaintiffs also allege that the Household Defendants have violated the California Financial Code, relying on section 22302(b), which provides: "A loan found to be unconscionable ... shall be deemed to be in violation of this division and subject to the remedies specified in this division." [FN4] Even though this section provides no private right of action, Cal. Fin.Code § 22713, Plaintiffs can still seek relief pursuant to section 17200. *See Stop Youth Addiction, Inc.*, 17 Cal.4th at 565-66, 71 Cal.Rptr.2d 731, 950 P.2d 1086 (where underlying statute does not include a private right of action, a private action may proceed under California Business & Professions Code § 17200).

> FN4. A loan violates California Financial Code § 22302 when it is unconscionable pursuant to California Civil Code § 1670.5, which provides: "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." Defendants fail to discuss this aspect of Plaintiffs' section 17200 claim. A determination of whether a contract is unconscionable requires a consideration of facts that are beyond the scope of a motion to dismiss. For this reason alone, the Household Defendants cannot obtain a dismissal.

a. *Plaintiffs Have Adequately Alleged Potential Assignee Liability*

(1) *The Household Defendants May Be Liable For Conduct Occurring Before or at Loan Origination*

***7** The Household Defendants contend the action must be dismissed because an assignee is not liable for state law violations that occur at loan origination. Motion 8:13-14. The Household Defendants oversimplify both the law and Plaintiffs' claims.

Plaintiffs respond that the Household Defendants' conduct is unlawful because it violates TILA, and that TILA imposes two different bases of liability for assignees. With respect to non-HOEPA loans "any civil action ... which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement...." 15 U.S.C. § 1641(a).[FN5] "For HOEPA loans, liability is not limited to violations *apparent on the face of loan documents*, ... but rather liability exists unless the assignee proves that a *reasonable person exercising ordinary due diligence could not determine ... the item-*

ization of the amount financed, and other disclosure of disbursements that the loan was a HOEPA loan, as detailed in section 1641(d)(1)." *Cooper v. First Gov't Mortgage & Investors Corp.*, 238 F.Supp.2d 50, 55 (D.D.C.2002). "Courts have interpreted section 1641(d)(1)'s due diligence requirement as placing the burden on an assignee to prove, by a preponderance of the evidence, that the assignee *could not reasonably determine, could not determine,* or *did not know* that the loan was a HOEPA loan." *Id.* at 56 (citation omitted).

> FN5. The Household Defendants counter that no violations appear on the face of the documents. That issue is discussed below.

The Household Defendants argue that Plaintiffs cannot have it both ways: Plaintiffs' claims are now asserted under state law and they cannot incorporate provisions of federal law to create liability. But the Household Defendants make a similar "mistake." They seek to incorporate provisions of state law concerning executory contracts, though the underlying basis of Plaintiffs' claims is *not* solely a violation of California contract law. The Household Defendants have not provided authority that the *UCL* itself precludes assignee liability as a matter of law.[FN6] Therefore, the Court must look to the potential liability for each specific unfair, fraudulent, or unlawful act or practice that forms a possible foundation for Plaintiffs' claims. Being an assignee in violation of TILA or HOEPA *is* an unlawful practice.

> FN6. The Household Defendants' claim that the UCL does not permit "secondary liability," Motion 17-22, is addressed below.

Even if the Household Defendants' argument were otherwise correct, the cases they cite suggest dismissal should be denied. For example, the Household Defendants assert that "an assignee that lacks any direct participation in originating the transaction bears no liability to the borrower," citing *LaChapelle v. Toyota Motor Credit Corp.*, 102 Cal.App.4th 977, 990, 126 Cal.Rptr.2d 32 (2002). Motion 9:3-5. In *LaChapelle,* the trial court granted summary judgment to an assignee. Plaintiff raised on appeal the argument that defendant should be characterized, not as an assignee, but as a lessor. The court of appeal declined to address this argument because it had not been raised below, but did note: "The validity of such an argument turns on the facts in any particular case, i.e., whether the assignee's connection with the original purchase or lease transaction is so close as to justify viewing the assignee as the original creditor." *Id.* at 983, 126 Cal.Rptr.2d 32. Here, Plaintiffs allege precisely that. *See, e.g.,* SACC ¶ 78 ("Pacific Shore was not a creditor ... in that the loan funds were advanced to it by Household Finance.") The Household Defendants also ignore Plaintiffs' allegations, *inter alia,* that the Household Defendants dictated the loan terms, financed the loans, and paid a premium for loans with prepayment penalty provisions. SACC ¶ 40. Plaintiffs have sufficiently alleged that the "assignee's connection with the original ... transaction is so close as to justify viewing the assignee as the original creditor." *See LaChapelle,* 102 Cal.App.4th at 990, 126 Cal.Rptr.2d 32.

***8** Similarly, the Household Defendants argue that "an assignee that possesses no actual knowledge of facts that surround a transaction is not responsible for the originator's conduct," citing *Security Pacific Nat'l Bank v. Chess,* 58 Cal.App.3d 555, 558, 129 Cal.Rptr. 852 (1976). Motion 9:6-8. Plaintiffs, however, allege that the Household Defendants were "aware of the illegal provisions of the loan agreements" and "dictated the terms." SACC ¶ 40. The Household Defendants' reference to *Enterprise Leasing Corp. v. Shugart Corp.*, 231 Cal.App.3d 737, 744, 282 Cal.Rptr. 620 (1991) does not assist either. There the court stated. "The general rule is that mere assignment of rights under an executory contract does not cast upon the assignee the obligations imposed by the contract upon the assignor." But Plaintiffs have unquestionably alleged more than a "mere assignment of rights." Thus, based on the authorities cited by the Household Defendants, even if the alleged violations occurred before the actual assignment to the Household Defendants, they may still be liable as assignees.

(2) *That Prepayment Penalty Provisions Sometimes are Lawful is Irrelevant on This Motion*

The Household Defendants argue that only the prepayment penalty provisions could be apparent from the face of the documents. Because such provisions are lawful in California under some circumstances, the Household Defendants conclude they cannot be liable for taking assignment of Plaintiffs' loans. Motion 11-12.

It is not clear to the Court whether the Household Defendants contend they cannot, therefore, be liable under TILA or HOEPA or whether they contend they cannot be liable under the UCL because their conduct was specifically permitted by state law-or both.

If assignee liability attaches pursuant to TILA and HOEPA alone, the Court still cannot decide the issue on the current motion because the disclosure statements have not been submitted to the Court. *See Hal Roach Studios,* 896 F.2d at 1555 n. 19 ("a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion"). If the Household Defendants contend that the Court should dismiss the action because "Plaintiffs do not allege that the prepayment penalty terms to which they agreed fall outside the statutory safe harbors," they are simply incorrect. Plaintiffs need not plead around all possible defenses, and this Court has before it no documents to establish the Household Defendants' safe harbor claims.

(3) *The Household Defendants' Argument Concerning the Settlement Agreements is Irrelevant*

The Household Defendants argue that the Court "should also reject Plaintiffs' allegations that the Household Defendants engaged in an 'unfair' practice by accepting assignment of loans that they were supposedly enjoined from making directly." Motion 13:3-5. These and other arguments related to Plaintiffs' allegations concerning the settlement agreements do not assist the Household Defendants. Plaintiffs do not base any claim solely on the alleged violation of the settlement agreements. Even if the Court were to disregard these particular allegations, Plaintiffs have adequately alleged unlawful or unfair conduct in violation of section 17200. "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim....' " *State Farm Fire & Casualty Co.,* 45 Cal.App. at 1103-04, 188 P. 85. The Court cannot weigh these factors on this motion, and this argument does not support dismissal.

b. *Plaintiffs Adequately Allege Direct Liability*

(1) *Plaintiffs Allege Numerous Instances of "Personal Participation"*

***9** The Household Defendants correctly assert that secondary liability cannot be imposed under the UCL. They argue that Plaintiffs "nowhere allege that the Household Defendants solicited borrowers, set the original loan terms, negotiated the loan agreements, or participated directly in the origination process." Motion 10:25-28. Again, the Household Defendants selectively describe Plaintiffs' allegations. Plaintiffs *do* allege that the "Household Defendants participate in the loans through a contractual arrangement with Pacific Shore for it to generate loans which the Household Defendants finance. Also, the Household Defendants pay a premium for loan transactions accompanied by unlawful prepayment penalties, and dictate in detail the terms of the loan transactions entered into by Pacific Shore." SACC ¶ 17. Plaintiffs further allege that the Household Defendants dictated the loan terms, financed the loans, and paid a premium for loans with unlawful prepayment penalty provisions. SACC ¶ 40.

On a motion to dismiss, the Court is obligated to view the facts in the light most favorable to the plaintiffs. Plaintiffs have adequately alleged that the Household Defendants were directly involved in the unlawful conduct. *See Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 157, 101 S.Ct. 2239, 68 L.Ed.2d 744 (1981) ("The dealer and Ford prearranged for the assignment of the finance instrument.... Indeed, the credit application form was prepared by Ford.... [I]t would be elevating form over substance to hold that Ford was anything but an original creditor within the meaning of the Act and Regulation Z.").[FN7]

FN7. The Household Defendants argue that Plaintiffs cannot show that they suffered lost money or property as a result of the Household Defendants' conduct because any loss occurred before the loans were assigned. *See Chamberlan v. Ford Motor Co.,* 369 F.Supp.2d 1138, 1149-50 (N.D.Cal.2005) ("The UCL now requires a private plaintiff seeking to bring an action for injunctive or restitutionary relief to establish that he or she 'has suffered injury in fact and has lost money or property.' "). Even if this were true, Plaintiffs allege that the Household Defendants were directly involved in the allegedly wrongful conduct that occurred before assignment. Accordingly, viewing the pleadings in the light most favorable to Plaintiffs, Proposition 64 does not bar Plaintiffs' claims.

Although the Household Defendants argue that "[t]he money that the Household Defendants loaned to PSF was not 'faulty when it left [the Household Defendants'] hands,' " Motion 21:10-11 (citing *In re Cases,* 126 Cal.App.4th at 982, 24 Cal.Rptr.3d 659), if the Household Defendants dictated the loan terms, they would have known of any alleged violations before the loans were funded. Indeed, Plaintiffs allege the Household Defendants dictated the terms and encouraged loans with unlawful terms. The Household Defendants also argue that "Plaintiffs do not allege that Household Defendants marketed the credit lines to PSF with the intent that PSF employ the money in supposedly wrongful loan transactions." Motion 21:17-20. However, the allegation that the Household Defendants paid a premium for loans with unlawful prepayment penalty provisions in violation of HOEPA is sufficient at this stage of the proceedings to suggest knowledge.

The Household Defendants also argue that Plaintiffs have failed to plead with particularity facts that establish the Household Defendants' direct involvement in the conduct at issue. Motion 20:6-18. Specifically, they argue that Plaintiffs fail to allege how the Household Defendants dictated the terms of the agreements, if they directly supervised the loan process, if they solicited or investigated customers, and if there were any meetings or conversations between the Household Defendants and PSF. *Id.* But these are not allegations of fraud, and do not require the level of detail the Household Defendants request.

(2) *The Household Defendants' Discussion of Aider and Abettor Liability is Irrelevant*

***10** The Household Defendants set up the "straw man" of aider and abettor liability, and then discuss at length why it does not apply. Motion 19-22. Because Plaintiffs do not rely on aider and abettor liability and because, as discussed above, Plaintiffs have otherwise sufficiently pled causes of action for violation of the UCL, the Court need not address this issue.

c. *Plaintiffs Do Not-and Need Not-Allege Alter Ego Liability*

Again the Household Defendants defeat an argument Plaintiffs have not made. Plaintiffs do not contend the Household Defendants are the alter ego of PSF. Plaintiffs' claims survive without such an allegation, and the Court does not address the issue here.

2. *Rescission and Restitution Claims-California Civil Code § 1689(b)(5), (b)(6)*

California Civil Code § 1689(b) provides: "(b) A party to a contract may rescind the contract in the following cases: ... (5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault. (6) If the public interest will be prejudiced by permitting the contract to stand." Plaintiffs argue that they are entitled to relief pursuant to section 1689(b)(5) because "failure to honor notices of rescission allowed under federal law is an unlawful act not revealed from the face of the contract." SACC ¶ 67. Additionally, Plaintiffs argue that they are entitled to relief pursuant to section 1689(b)(6) because the contract "contains illegal provisions, and was obtained in violation of the express provisions of TILA and HOEPA." The Household Defendants make no specific ar-

guments regarding these claims. For one or more of the reasons discussed above, Plaintiffs may proceed with these claims.

B. *Motion to Strike*

Defendants argue that paragraphs 17 and 40 of Plaintiffs' Second Amended Consolidated Complaint should be stricken because they are redundant, immaterial, impertinent, or scandalous and inappropriately reference inadmissible evidence of a prior settlement agreement. Motion to Strike 1:23-24. Paragraph 17 provides:

> Household has previously agreed, in connection with resolution of litigation against it not to insert unlawful prepayment penalties in its loan documents. Since that time, Household has adopted the strategy of acting through surrogates such as Pacific Shore, which can freely insert unlawful prepayment penalties in loan documents and which can freely thereafter assign those loans to Household. This stratagem was designed for the specific purpose of permitting Household to avoid its previous agreement.

SACC ¶ 17. Paragraph 40 provides: "Also, Household set up its arrangement with Pacific Shore specifically with the intent of avoiding its agreement in connection with other litigation to refrain from inserting unlawful prepayment penalties in loan documents." SACC ¶ 40.

At the time of filing their Motions, the Household Defendants believed that Plaintiffs referred to a nationwide class action settlement, *In re Household Lending Litigation*, Case No. C02-1240 C.W. (N.D.Cal.) [FN8] There, certain Household Defendants entered into a settlement agreement in October 2003, which was approved by the court on April 30, 2004. Motion 13:19-22. The Household Defendants allege that: (1) the settlement agreement excludes all loans originated by others; (2) loans that are subject to the settlement agreement may include prepayment penalties so long as the penalty period does not exceed two years, and so long as no penalty is collected if the borrower refinances with an affiliated company; (3) Plaintiffs' loans were all originated prior to the settlement; (4) Rule 408 of the Federal Rules of Evidence expressly prohibits use of a prior settlement as evidence of liability; and (5) this Court lacks jurisdiction to address any purported violation of the settlement agreement because the Northern District of California has retained jurisdiction. Motion 13-17. It now appears that Plaintiffs rely instead (or in addition) on a settlement agreement with the California Attorney General.

> FN8. Plaintiffs object to the Household Defendants' references to extrinsic evidence. They argue that the settlement agreement, attached as Ex. C, is not properly the subject of a request for judicial notice and object to its authenticity. Motion to Strike Opp'n 9:13-17. A district court may consider "[r]ecords and reports of administrative bodies," *id.*, and other "matters of public record outside the proceedings," such as motions filed in other cases. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986) (citations omitted). Accordingly, so long as the exhibit is a matter of public record, judicial notice is appropriate.
>
> The Court notes also that Plaintiffs delayed in their response to Defendants' attempt to meet and confer pursuant to Local Rule 7-3. The Court enforces Local Rule 7-3 and advises Plaintiffs to respond appropriately and timely in the future.

***11** The allegations clearly are not redundant or scandalous:

Plaintiffs argue that Rule 408 does not bar admission of the settlement agreement. " Federal Rule of Evidence 408 permits evidence of settlement agreements for purposes other than proving liability." *United States v. Hauert*, 40 F.3d 197, 200 (1994) (admitting evidence of a settlement agreement "to show whether Hauert knew 'what the law is' and his 'legal duty' thereunder"); *see also United States v. Gilbert*, 668 F.2d 94, 97 (1981) (decree was admitted to show that Gilbert knew of the SEC reporting requirements involved in the decree). They allege that they seek to introduce the settlement agreement on issues unrelated to liability-the Household

Defendants' due diligence under the HOEPA claims. FN9 The settlement agreements may also be evidence of the Household Defendants' intent or knowledge. FN10

> FN9. Plaintiffs allege that the provisions in Ex. C of the Request for Judicial Notice "establish[ ] that Household is aware that prepayment penalty provisions are unlawful if they contain terms permitting a prepayment penalty to be charged in a refinance with the lender which issued the loan." Motion to Strike Opp'n 4:22-28.
>
> FN10. The Household Defendants argue in their Reply that Plaintiffs have no standing to seek to enforce any settlement agreement; however, Plaintiffs do not ask the Court to find that there has been any violation of a settlement agreement. Motion to Strike Reply 1:10-15; 2:22-28. An alleged violation of the settlement agreement is not the basis for Plaintiffs' unfair business practices claim.

The dispute is premature and need not be resolved here. The SACC is not evidence in the case. This Court need not decide at this early stage what will or will not be admitted into evidence.

The Household Defendants' other arguments do not support striking the allegations. Accordingly, the motion to strike paragraphs 17 and 40 is denied.

V. *CONCLUSION*

For the reasons previously stated, Defendants' Motion to Dismiss is DENIED and Defendants' Motion to Strike Allegations in Plaintiffs' Second Amended Consolidated Complaint is DENIED.

C.D.Cal.,2006.
Cazares v. Pacific Shore Funding
Not Reported in F.Supp.2d, 2006 WL 149106 (C.D.Cal.)

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